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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

94-107

In the Matter of	)	
	)	
Petition on Behalf of the	)	
Louisiana Public Service Commission	)	PR File No. 94-SP5
for Authority to Retain Existing	)	
Jurisdiction Over Commercial Mobile	)	
Radio Services Offered Within the	)	
State of Louisiana	)	

OPPOSITION OF MCCAW CELLULAR COMMUNICATIONS, INC.

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September 19, 1994

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To: The Commission

OPPOSITION OF McCAW CELLULAR COMMUNICATIONS, INC.

McCaw Cellular Communications, Inc. ("McCaw"),[1] by its attorneys, hereby submits this opposition in response to the petition of the Louisiana Public Service Commission ("LPSC") filed in the above-captioned proceeding.

Introduction and Summary

In the Second Report and Order,[2] the Commission established a sound regulatory foundation for the continued growth and development of commercial mobile radio services ("CMRS"). The Commission correctly concluded in that proceeding that existing market conditions, together with enforcement of other provisions of Title II, render tariffing and rate

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1/ McCaw provides cellular service to more than 2.5 million subscribers in 24 states, including Louisiana.

2/ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd. 1411 (1994) ("Second Report and Order").

regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect consumers. The Commission found that imposing these requirements on cellular and other CMRS providers would not serve the public interest, and that forbearance from unnecessary regulation of CMRS providers would enhance competition in the mobile services market.[3] Finally, the Commission assured that like mobile radio services would be subject to consistent regulatory treatment. Evaluated against these principles, the above-captioned petition must be denied.

First, Congress preempted state rate and entry regulation because it recognized that a patchwork of inconsistent state rules would undermine the growth and development of mobile services, which, by their nature, operate without regard to state boundaries.[4] While the statute provides a process for a state to request rate regulatory authority, it sanctions the exercise of that authority only in extreme cases: when significant market failure justifies substituting regulation for the operation of market forces.[5] The Commission recognized that state regulation could become a burden to the development of the wireless infrastructure -- and could impede the statutory mandate for regulatory parity. Consistent with the intent of Congress, the Commission

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3/ Id. at 1467.

4/ See H.R. Rep. No. 213, 103d Cong., 1st Sess. 494 (1993) ("Conference Report"); H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993) ("House Report").

5/ 47 U.S.C. § 332(c)(3). See also House Report at 261-62 (in reviewing petitions filed by the states, "the Commission also should be mindful of the Committee's desire to give the policies embodies [sic] in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee"). In this regard, the Commission should confirm the plain intent of Section 332(c) and preempt state regulation concerning all services offered by a commercial mobile service provider, including enhanced services as well as basic communications services.

established "substantial hurdles" that a state must clear in order to justify rate regulation of CMRS providers.

Second, the LPSC has utterly failed to make the substantial showing required to justify the authority it seeks in the above-captioned proceeding. Rate regulation is unnecessary in light of current and reasonably foreseeable market conditions. The Commission has already determined that the level of competition in the CMRS marketplace is sufficient to support broad forbearance from rate regulation. The LPSC has provided no evidence that the level of competition in Louisiana departs significantly from the market conditions relied upon by the Commission, nor has it demonstrated that cellular carriers in Louisiana have exercised market power.

The economic analysis put forward to support the LPSC's claim for regulatory authority is fundamentally flawed. The LPSC ignores the fact that cellular carriers will soon face competition from so-called enhanced specialized mobile radio systems ("ESMRs") and from licensees using the 120 MHz of spectrum recently made available for PCS, and it ignores declining prices for cellular service and the substantial recent growth in subscribership and investment by cellular carriers. At most, the LPSC's flawed economic analysis demonstrates only the CMRS marketplace is not perfectly competitive. But, as the Commission itself has acknowledged, perfect competition is not a necessary prerequisite for forbearance.

Fourth, the LPSC fails to demonstrate that consumers would benefit from regulation. Price controls limit the ability of regulated firms to respond to changes in technology and in cost and demand conditions. Rate regulation also deters new investments, improvements in service quality, and new entrants in the marketplace.

The public interest is better served by the regulatory forbearance embodied in the Second Report and Order and the introduction of additional competition through the allocation of new spectrum for CMRS, and Congress intended for these policies to be given "adequate opportunity to yield the [anticipated] benefits of increased competition and subscriber choice" before state rate regulation was imposed on CMRS providers.[6/] Given the acknowledged harms from such regulation and the LPSC's failure to demonstrate the need to impose price controls on cellular carriers, the Petition should be denied.[7/]

I. SECTION 332(c) AND THE SECOND REPORT AND ORDER IMPOSE AN EXTREMELY DEMANDING STANDARD FOR THE AUTHORIZATION OF STATE REGULATION OF CELLULAR SERVICES

In evaluating the LPSC Petition, the Commission must resist the invitation of Louisiana to engage in a de novo analysis of competition in cellular markets and the appropriate regulatory framework for addressing these market conditions. The Second Report and Order clearly sets forth the Commission's general analysis with respect to the level of competition in cellular markets, and makes fundamental policy choices with respect to appropriate regulation. These fundamental policy decisions, as well as the framework established by the Section 332(c), dictate that the grant of state petitions to permit rate or tariff regulation should be very much the exception rather than the rule.

[6/] House Report at 261.

[7/] It is important to bear in mind that denial of the petition does not foreclose state regulatory authorities from returning to the Commission at a later date should evidence appear that consumers are indeed being injured because rate regulation is not being exercised at the state level. Thus, the burden of proof is properly placed on the petitioning state to show why free market forces should not be given a chance to operate now.

In any petition for rate regulation authority, the statute and the Commission's rules clearly place the burden on the petitioning state to justify the need for such authority. The LPSC has failed to meet that burden. Rather, there appears to be little basis for the LPSC's Petition other than other than a regulatory philosophy and a set of underlying assumptions that are fundamentally at odds with the basic framework adopted by the Commission in the Second Report and Order.[8/] In the absence of the proof required by the Commission, the LPSC's Petition must be rejected.

The Commission has already determined that the level of competition in the CMRS marketplace, together with enforcement of other provisions of Title II, render tariffing and rate regulation unnecessary to ensure that CMRS prices are just and nondiscriminatory or to protect consumers.[9/] Inasmuch as the Commission did not insist on perfect competition as a prerequisite for deregulation,[10/] the "substantial hurdle" to be met by states seeking to regulate cellular services cannot be satisfied with the LPSC's dubious evidence of market imperfections or less than fully competitive conditions. Rather, the Second Report and Order suggests a three-part test, with each state required to meet its burden of proof on each part of the test.

First, to support a petition for rate authority, the petitioning state must show that market conditions unique to that state are substantially less competitive and substantially more likely to cause harm to consumers than the market conditions that have been found generally to support

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8/ In this regard, it is noteworthy that two of the states filing petitions both opposed forbearance from regulation at the federal level, in addition to seeking to preserve state authority. See Comments of the State of California in Gen. Docket No. 93-252; Comments of the State of New York in Gen. Docket No. 93-252.

9/ Second Report and Order at 1467.

10/ See, e.g., id. at 1472.

the Commission's decision to forbear from rate and tariff regulation. Second, since the Commission expressly relied upon the continuing applicability of Section 201 and 202's requirements for just, reasonable, and not unreasonably discriminatory rates, and the availability of the complaint procedure under Section 208 to address any residual competitive problems, the LPSC must demonstrate that whatever unique competitive problems it has identified cannot be adequately addressed through these federal remedies. Finally, in the unlikely event that a state can satisfy the factors described above, it must also show that any residual risks to consumers, i.e., the marginal benefits of the proposed state regulation, outweigh the substantial costs associated with regulation. As a threshold matter, of course, the state must also "identify and provide a detailed description of the specific existing or proposed rules that it would establish if [the Commission] were to grant [the state's] petition."[11] Approval of a state petition that fails to meet this test would contravene the statutory framework, resulting in the imposition of rate regulation under circumstances in which the Commission itself has found such regulation to be unnecessary and counterproductive.

A. State Regulation Is Presumptively Inconsistent With The Objectives Of Section 332(c) As Implemented By The Commission

Congress' adoption of amendments to Section 332 in the Budget Act was based upon three overarching policy objectives: first, the need for symmetrical regulation of competitive service providers, notwithstanding the anachronistic regulatory categories of the past; second, the need for a consistent and coherent national regulatory framework for mobile services, which by their nature are not confined by state boundaries; and third, the need to minimize regulatory

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[11] Second Report and Order at 1505.

distortions of free market competition so that competitive success is dictated not by regulation but by success in meeting the needs of consumers. State regulation in general, and regimes that regulate only cellular carriers in particular, of the sort proposed by the LPSC are inherently inconsistent with these objectives. Fidelity to the statutory framework, as interpreted by the Commission in the Second Report and Order, dictates a very substantial burden of proof on the states to justify any proposed state regulation.

With respect to the first objective, Congress revised Section 332 because it found that the regulatory structure governing mobile services -- which permitted "private" mobile services to escape regulation while functionally equivalent "common carrier" services were subject to state as well as Federal rules -- could "impede the continued growth and development of commercial mobile services and deny consumers the protections they need."[12] Congress recognized that the implementation of original Section 332 had created a cockeyed marketplace in which enhanced specialized mobile radio licensees, but not their cellular competitors, were exempt from Title II of the Communications Act and from state regulation, and where radio common carriers were forced to compete against private carrier paging operators that faced essentially no regulation at the Federal or state level.[13]

In the Second Report and Order, the Commission appropriately emphasized these considerations in fashioning critical elements of the regulatory scheme for commercial mobile radio services. Thus, the Commission concluded that its elaboration of the elements of the commercial mobile radio service definition would

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[12] House Report at 260.

[13] See id. at 260 n.2.

> ensure[] that competitors providing identical or similar services will participate in the marketplace under similar rules and regulations. Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs -- and not by strategies in the regulatory arena. This even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth.[14]

Both Congress and the Commission expressed serious concern, however, that this "even-handed regulation" could be disrupted by state regulation. The legislative history of the Budget Act instructs the Commission to "ensure that [state] regulation is consistent with the overall intent...that, consistent with the public interest, similar services are accorded similar regulatory treatment."[15] The Commission echoed this concern in observing that "our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity."[16]

The Louisiana Petition proposes exactly the sort of regulation which Congress feared, and which the Commission sought to avoid in adopting its preemption rules. By proposing only to regulate cellular carriers, the State of Louisiana has in essence proposed to recreate [maintain] at the state level exactly the sort of asymmetrical regulation which led to the adoption of the amendments to Section 332 in the first place.

It is equally clear that state regulation is presumptively incompatible with Congress' express desire for uniform national regulation of commercial mobile services. Enactment of revised Section 332 was guided by a recognition that Federal jurisdiction was the most

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[14] Second Report and Order at 1420.

[15] Conference Report at 494.

[16] Second Report and Order at 1421.

appropriate regulatory locus for mobile services "that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[17] Again, the Second Report and Order was careful to carry out this objective. As the Commission observed,

> [W]e have engendered a stable and predictable federal regulatory environment, which is conducive to continued investment in the wireless infrastructure. Our definition of CMRS not only represents fidelity to congressional intent, but also establishes clear rules for the classification of mobile services, minimizing regulatory uncertainty and any consequent chilling of investment activity.[18]

State regulation of the sort proposed by Louisiana also undermines Congress' express instruction that the Commission carefully consider whether market conditions justify forbearance from most forms of regulation under Title II of the Communications Act. In interpreting this mandate, the Commission established "as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers..."[19] Thus, the Commission concluded that

> In deciding whether to impose regulatory obligations on service providers under Title II, we must weigh the potential burdens of those obligations against the need to protect consumers and to guard against unreasonably discriminatory rates and practices. In making this comparative assessment, we consider it appropriate to seek to avoid the imposition of unwarranted costs or other burdens upon carriers because consumers and the national economy ultimately benefit from such a course.[20]

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[17] House Report at 260. See also Conference Report at 490 (intent of revised Section 332 is to "establish a Federal regulatory framework to govern the offering of all commercial mobile services") (emphasis supplied).

[18] Second Report and Order at 1421 (emphasis supplied).

[19] Id. at 1418 (emphasis supplied).

[20] Id. at 1419.

Further, the Commission emphasized the need to

> ensur[e] that regulation is perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communication services -- rather than as a burden standing in the way of entrepreneurial opportunities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.[21]

The same factors which militate strongly against regulation at the federal level militate equally strongly against burdensome regulation at the state level.

In light of these Congressional objectives, and the policy decisions embodied in the Second Report and Order, the Commission properly established a strong presumption against granting state petitions for authority to regulate commercial mobile services, including cellular services. The Commission acknowledged that Congress made a fundamental choice "generally to preempt state and local rate and entry regulation of all commercial mobile radio services..."[22] The Commission thus "vigorously implemented the preemption provisions of the Budget Act,"[23] by requiring that states "clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers."[24]

Beyond these clear, if general, statements, the Commission's substantive analysis of competition in cellular markets and the appropriateness of regulation establishes several important benchmarks for evaluating state showings. Based on the Commission's analysis and

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[21] Id. at 1421.

[22] Id. at 1504 (emphasis supplied).

[23] Id. at 1419.

[24] Id. at 1421.

conclusions, McCaw submits that the states must provide conclusive proof on three independent issues before a Petition to retain or impose regulation may be granted.

B. The LPSC Must Demonstrate That Prevailing Market Conditions In Louisiana Are Substantially Less Competitive Than The Commission Found Generally; That Federal Remedies Are Inadequate To Address Such Conditions; And That Any Residual Benefits Of State Regulation Outweighs The Costs Of Regulation Recognized By The Commission

The LPSC's Petition cannot be evaluated in a vacuum. Rather, the Commission must take as the starting point for its analysis the policy decisions and conclusions already made in the Second Report and Order. The LPSC loses sight of the fact that the Commission has already considered whether competitive conditions in cellular markets warrant various forms of regulation, and found that they do not. The Commission has also held that the regulatory framework it has adopted should suffice to remedy competitive abuses or unjust and discriminatory rates. Finally, the Commission has generally found that rate, entry and tariff regulations, as a general matter, are costly and burdensome and should be avoided wherever possible.

Each of these findings strongly reinforces the presumption against state regulation. Looked at another way, in order to justify state regulation, Louisiana must be required to produce evidence that each of these general conclusions is not warranted with respect to the unique conditions in that state. If, on the other hand, Louisiana fails to carry its burden of proof on each of these issues, its petition must be denied.

The LPSC's Petition sets forth a variety of purported "evidence" in an attempt to establish that the market for provision of cellular service in Louisiana is less than fully competitive. While this Opposition will conclusively demonstrate that none of this "evidence" supports such a conclusion, it is critical to keep in mind that the Commission adopted its forbearance regime even though it was unable to conclude, on the record before it, that cellular markets were fully competitive. Thus, after an extended discussion of the record with respect to the competitiveness of cellular markets, the Commission concluded that

> [i]n summary, the data and analyses in the record support a finding that there is some competition in the cellular services marketplace. There is insufficient evidence, however, to conclude that the cellular services marketplace is fully competitive.[25/]

Despite the Commission's unwillingness to find that the cellular market was "fully competitive" on the record before it, the Commission expressly refused to find that the competitive imperfections in these cellular markets warranted tariff, entry or rate regulation. To the contrary, the Commission found that the record established that "there is sufficient competition in this marketplace to justify forbearance from tariffing requirements."[26/] Similarly, the Commission observed that "there is no record evidence that indicates a need for full-scale regulation of cellular or any other CMRS offerings."[27/]

As a legal matter, by expressly forbearing from entry, rate or tariff regulation of cellular services, the Commission found, under the statutory standard, that such regulation was "not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with CMRS are just and reasonable and are not unjustly or unreasonably discriminatory"[28/] and

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25/ Second Report and Order at 1472.

26/ Id. at 1478.

27/ Id. (emphasis supplied)

28/ Id.

that such provisions are "not necessary for the protection of consumers."[29] This is the same standard applicable to state petitions for rate regulatory authority.[30] A state cannot satisfy this standard merely by submitting evidence that competition in cellular markets is less than perfect. Rather, states must be required to show that market conditions in their state are substantially less competitive than those which the Commission found not to justify regulation at the federal level.

Even if a state succeeds in demonstrating the existence of competitive conditions worse than those already considered by the Commission, which the LPSC has not, this does not end the inquiry. In deciding to forbear from regulation at the federal level, the Commission found that

> continued applicability of Sections 201, 202 and 208 will provide an important protection in the event there is a market failure. . . . In the event that a carrier violate[s] Sections 201 [requiring interconnection] or 202 [prohibiting unjust and unreasonable rates and practices], the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act.[31]

The requirement of just, reasonable, and nondiscriminatory rates and the ongoing availability of the complaint process serve also to remedy potential abuses that may arise in the states. In order to support a finding that state regulation is necessary to protect consumers from unjust and unreasonable rates or discrimination, a state must demonstrate that the Federal requirements and procedural remedies preserved in Section 332(c) are inadequate to eliminate any abuses or potential for abuse proven by that state. This the LPSC has failed to do.

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[29] 47 U.S.C. § 332(c)(1).

[30] Compare id. with 47 U.S.C. § 332(c)(3).

[31] Second Report and Order at 1478-79.

Even if a state were able to demonstrate unique competitive conditions and that Federal law is insufficient to address these conditions -- a showing that none of the petitioning states has satisfied -- the state must make the further showing that, on balance, state regulation is an appropriate response and produces net benefits. As the Commission has recognized time and again, the mere fact that regulation has benefits does not end the inquiry. As the Commission observed in the context of tariffing requirements, regulation "imposes administrative costs and can [itself] be a barrier to competition in some circumstances."[32/]

The Second Report and Order itself identified substantial costs associated with tariffing, one of the major regulatory requirements proposed by the LPSC[33/] and found that "[i]n light of the social costs of tariffing, the current state of competition, and the impending arrival of additional competition, particularly for cellular licensees, forbearance from requiring tariff

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32/ Id. at 1479.

33/ The Commission observed

> [i]n a competitive environment, requiring tariff filings can (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings; (2) impede and remove incentives for competitive price discounting, since all price changes are public, which can therefore be quickly matched by competitors; and (3) impose costs on carriers that attempt to make new offerings.... tariff filings would enable carriers to ascertain competitors' prices and any changes to rates, which might encourage carriers to maintain rates at an artificially high level. Moreover, tariffs may simplify tacit collusion as compared to when rates are individually negotiated, since publicly filed tariffs facilitate monitoring.... [T]ariffing, with its attendant filing and reporting requirements, imposes administrative costs upon carriers. These costs could lead to increased rates for consumers and potential adverse effects on competition.

Id.

filings from cellular carriers, as well as other CMRS providers, is in the public interest."[34] Fidelity to this analysis clearly requires that a state seeking to impose regulation show that any demonstrated benefits to state regulation outweigh these costs. The LPSC's Petition fails even to recognize the need to make these showings. As demonstrated below, its Petition must be denied.

II. THE LPSC HAS FAILED TO JUSTIFY RATE REGULATION OF CMRS

A. The LPSC Seeks General Authority To Extend And Expand Existing Pervasive Rate And Entry Regulation Of Cellular Carriers

The LPSC seeks broad authority to continue and expand the rate regulation that Louisiana had in effect as of June 1, 1993, "for the benefit and protection of Louisiana ratepayers" and because it "believes that market conditions with respect to CMRS may fail to protect consumers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[35] It asserts that it needs to continue to regulate in order to protect consumers pending its further review of the market, which it believes may produce evidence that rate of return or ratebase regulation is necessary.

The LPSC fails to provide any evidence of market failure or anticompetitive practices to justify its request for this broad regulatory authority. As demonstrated in detail below, the LPSC's market analysis is based on erroneous factual premises, faulty economic reasoning, or unproved assumptions. The Petition also fails to provide any factual evidence that the regulatory

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[34] Id.

[35] LPSC Petition at 2 n.2.

program the LPSC desires to extend would provide any benefits whatsoever to the public, much less outweigh its costs, even if the degree of competition in the current cellular market were as limited as the LPSC erroneously alleges.

The LPSC's Petition is premised on a fundamental disagreement with the Commission. According to the LPSC, the Commission's historic cellular licensing policy has precluded the development of effective competition for cellular services by creating a "duopoly" market structure in which cellular carriers are able to engage in anticompetitive behavior.[36/] The LPSC contends that the existing regulatory scheme is so inherently defective that regulatory intervention is required, despite this Commission's contrary conclusions.[37/]

It is not enough to claim, as the LPSC does, that it has intervened only when necessary to correct market failures[38/] or that reliance upon competitive market forces is its true goal.[39/] These statements must be measured against the scope of the regulatory authority that the LPSC now seeks. Section 332(c) and the Second Report and Order reflect a strong presumption against state rate regulation that can only be overcome by a strong showing that such regulation is necessary. This the LPSC has failed to do.

36/ See, e.g., id. at 27-28, 33.

37/ See, e.g., LPSC Petition at 28. LPSC claims it is no longer convinced that the level of competition in Louisiana is adequate to protect consumers and is investigating whether the rates of cellular carriers should be regulated on a rate base/rate of return basis or in some other manner. Id.

38/ LPSC Petition at 34-35.

39/ Id. at 35-36.

B. The Petition Suffers From Several Significant Procedural Deficiencies

Even apart from its dubious merits, the Petition suffers from two significant procedural defects. First, contrary to the plain language of Section 332(c), the LPSC seeks to regulate market entry by CMRS providers. Section 332(c)(3)(A) preempts state entry regulation, and permits state petitions solely for the purpose of seeking authority over rates. Second, the LPSC seeks "grandfathered" treatment of rate regulations adopted since June 1, 1993. Finally, the LPSC fails to provide a detailed description of the specific rules it would apply if the Commission were to grant the Petition.

1. Section 332 Does Not Permit State Regulation Of Market Entry

The LPSC requires CMRS providers to register with the LPSC prior to offering service.[40] A provider must make a technical, financial and informational showing of fitness, including a detailed proposed tariff disclosing the "current rates the applicant will charge" as well as terms and conditions.[41] These applications are subject to the LPSC review.[42] It is questionable whether such requirements can truly be characterized as "registration" requirements. What additional obligations may attach is not evident from the Petition.

Section 1503 of the Louisiana Revised Statutes unambiguously establishes a barrier to entering the CMRS marketplace.[43] No "radio common carrier" can provide service without

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40/ LPSC Petition at 7-8.

41/ See LPSC Petition, Exhibits 9 and 10.

42/ Id.

43/ 45 LA REV. STAT. ANN. § 1503, included in LPSC Petition, Exhibit 7.

first seeking a certificate of public convenience and necessity, and the LPSC cannot grant a certificate to a carrier

> which will be in competition with or duplication of any other radio common carrier unless it shall first determine that the existing service is inadequate to meet the reasonable needs of the public and the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide reasonable adequate service.[44]

This is clearly entry regulation, which Section 332 clearly forbids.

Section 332(c)(3) states categorically that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A). A state may petition for the authority solely to regulate <u>rates</u>.[45] The Act does not permit the filing or granting of a petition for state regulation of market entry.

2. The LPSC Seeks to Grandfather Rate Regulations That Were Not in Effect on June 1, 1993

Section 332(c) of the Communications Act preempts state rate regulation of commercial mobile services unless a state successfully petitions the Commission for authority to engage in such regulation under statutorily-established standards.[46] The statute provides for a limited "grandfathering" of pre-existing state rate regulations:

> (B) If a State has *in effect on June 1, 1993, any regulation* concerning the rates for any commercial mobile service offered in such State on such date, such State may no later than 1 year after the date of enactment of the Omnibus Budget Reconciliation Act of 1993, petition the Commission requesting that the State be authorized to *continue* exercising authority over such rates. If a State files such

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[44] <u>Id.</u> at § 1503(C).

[45] See 47 U.S.C. §§ 332(c)(3)(A) ("a State may petition the Commission for authority to regulate the <u>rates</u> for any commercial mobile service"); 332(c)(3)(B) (State may petition to be authorized to "continue exercising authority over <u>rates</u>") (emphasis supplied).

[46] 47 U.S.C. § 332(c)(3).

> a petition, the State's *existing regulation* shall, notwithstanding subparagraph (A), *remain in effect* until the Commission completes all action (including any reconsideration) on such petition.[47]

The instant petition was filed under the authority conferred by this provision. In it, the LPSC seeks grandfathered treatment for, inter alia, rate regulations imposed on cellular carriers by the General Order adopted July 29, 1994, more than one year after the June 1, 1993 grandfathering deadline established by law.[48] Without the grant of authority from the Commission to impose these new rate regulations, the LPSC is preempted from imposing them. The Commission should issue an interim order declaring the adoption of the General Order null and void. As demonstrated herein, moreover, the regulations imposed by the General Order do not meet the statutory standards that a state must satisfy to obtain a grant of rate regulation authority.

There can be no doubt that the General Order imposes additional new rate regulations on cellular carriers. The General Order requires all cellular carriers to provide itemized billing to subscribers at no charge.[49] Prior to the adoption of this rule, carriers charged a fee to subscribers who desired an itemized bill. In effect, the General Order established a charge for this service. This rule was not in effect on June 1, 1993.

The LPSC's assertion of grandfathered treatment for this new rule ignores the plain language of the statute and, because the General Order applies solely to cellular carriers, exacerbates the regulatory disparity among CMRS providers that Congress sought to eliminate

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[47] 47 U.S.C. § 332(c)(3)(B) (emphasis added).

[48] LPSC General Order, In re: Itemized Billing by Cellular Carriers for Local Calls Made by Its Customers (adopted July 29, 1994) ("General Order"); see LPSC Petition, Exhibit 25.

[49] Id.

through the enactment of Section 332(c).[50] The language of Section 332(c)(3)(B) is clear on its face. The "existing regulation" referred to in the second sentence is simply a shorthand for the regulation "in effect on June 1, 1993" in the first sentence. This meaning is reinforced by the verbs "continue" and "remain in effect," which obviously refer to regulations that have become effective, not general authority to regulate that exists whether or not specific regulations are made effective pursuant to such general authority. Thus, during the pendency of a petition such as the instant one, Section 332(c)(3)(B) permits a state to continue to enforce only those rate regulations that were in effect on June 1, 1993.

C. Louisiana Has Enjoyed A Decade Of Expanding Cellular Service And Declining Cellular Prices

The LPSC Petition attempts to paint a picture of Louisiana cellular duopolists engaged in a pervasive effort to abuse market power by maintaining artificially high prices to the detriment of consumers. However, the facts are that cellular carriers in Louisiana are expanding their networks and lowering prices, not keeping supply low to obtain alleged monopoly rents. As the LPSC itself states, "[t]he cellular industry has experienced rapid growth in technology, subscriber numbers, and revenues since the industry's beginning."[51] Indeed, as recently as June 1994, a report ordered by the LPSC concluded that cellular systems in Louisiana are "deployed throughout the state with only minor pockets of uncovered territory providing voice

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[50] See, e.g., Conference Report at 494 (Commission shall ensure that any approved state rate regulation "is consistent with the overall intent of [Section 332(c)] . . . , so that, consistent with the public interest, similar services are accorded similar regulatory treatment").

[51] LPSC Petition at 38. See also LPSC Petition, Exhibit 51, illustrating the extensive expansion and growth in cellular.

and data services."[52] Although the LPSC acknowledges the expansion and growth of cellular, it submits that it has not assessed what is the degree and nature of competition in the market or how the market is managing this rapid growth.[53] Thus, the LPSC insists it needs authority to undertake such an assessment of the market and to control rates to compensate for any discovered lack of competitiveness resulting in "supra-competitive rates to consumers."[54] The position espoused by the LPSC is in stark contrast to the conclusions contained in its Petition and Exhibits, and is bereft of any explanation of the facts which would support this internal inconsistency.

1. LPSC Cellular Carriers Are Investing To Meet Subscriber Demand

Cellular carriers first began to offer service only ten years ago, and cellular services have become widely available (as a result of system construction) only within the last five years. Since the industry's inception, Louisiana cellular carriers have established a remarkable record of aggressive investment in system infrastructure and rapid customer growth. McCaw estimates that its current number of subscribers exceeds 20,000.[55] Moreover, there is no sign that the

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52/ "Louisiana Telecommunications Task Force, Service Providers Committee Final Report" at p.11 (June 1, 1994), LPSC Petition, Exhibit 47.

53/ LPSC Petition at 38-39.

54/ Id.

55/ Industry and financial analysts' estimates place current cellular subscribership at more than 19 million.

rate of subscriber growth is declining. The cellular industry, including McCaw's cellular systems in Louisiana, reported record increases in customers in the last quarter of 1993.[56]

The popularity of cellular service has been supported by, and has created a demand for, sustained infrastructure investment by Louisiana cellular carriers. Above all, cellular customers expect reliable service and as broad a geographic area of coverage as possible. Thus, cellular carriers have competed in building their systems to meet these expectations. Today, competing cellular facilities serve every market in Louisiana, offering service throughout the State.[57] However, to the extent each carrier succeeds in attracting new customers, it must also continue to invest in network improvements. Thus, carriers have been required to build new cell sites in order to accommodate additional subscribers without sacrificing service quality. The continued demand for more cells creates significant financial, governmental, and technical challenges.

McCaw has done its utmost to overcome these challenges. In 1991, McCaw's Louisiana systems were served by 14 cell sites; today, more than 23 are in service and another 12 are projected to be in service by the end of 1995. McCaw's total investment in plants in Louisiana has increased by nearly 33 percent this year alone. McCaw's experience is consistent with that of the industry as a whole: surveys conducted by the Cellular Telephone Industry Association ("CTIA") show that the number of cell sites constructed, and the amount of cellular

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[56] Nationwide, systems controlled by McCaw and those in which its subsidiary, LIN Broadcasting, owns an interest reported subscriber growth during 1993 of 37%.

[57] See LPSC Petition, Exhibit 47 at 11.